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IN THE

SUPREME COURT OF THE UNITED STATES

"OCTOBER TERM 1977"

NO. 76-1488

JOE JACOBSON,

Appellant,

vs.

CITY OF TUCSON, a body politic; LEWIS C. MURPHY, the Mayor of the City of Tucson; DONALD L. DeMENT, City Clerk of the City of Tucson; RUBEN ROMERO; RICHARD J. KENNEDY; ROBERT C. CAUTHORN; EMMETT McLOUGHLIN; RUDY A. CASTRO and BARBARA L. WEYMANN, Members of the City Countil of the City of Tucson,

Respondent.

ON APPEAL FROM
THE SUPREME COURT OF ARIZONA

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Richard J. Dowdall
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OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellant, pursuant to Rule 16(d)(4) of the Revised Rules of the Supreme Court of the United States, opposes Appellees' Motion to Dismiss the appeal in the above entitled matter and alleges that jurisdiction in this case is proper on the grounds that the cause is not moot and that the judgment of the Arizona Supreme Court is not based on such a substantial and sufficient independent state ground so as to preclude review of the federal questions involved.

Appellant also opposes Appellees' Motion to Affirm the judgment of the Arizona Supreme Court on the ground that a substantial federal question exists under constitutional precedent so as to warrant further argument.

Additionally, in the event it is determined that United States Supreme Court review is appropriate through certiorari and Appellees' Motion to Dismiss or Affirm is deemed an Opposition to Petition for Certiorari, Appellant contends that Appellant has established his burden under Rule 19 in that special and important reasons for granting the writ exist. The decision below involves an important question of federal law which has not been, but should be, settled by this Court. The Arizona Supreme Court incorrectly held that the Findings of Fact and Conclusions of Law of the trial court, establishing entitlement to office and a violation of Due Process and Equal Protection, were erroneous.

OPINION BELOW

The opinion of the Arizona Supreme Court is reported at 113 Ariz. 534, 558 P. 2d 686 (1976).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2) as

an appeal from the Arizona Supreme Court's decision upholding, against Due Process and Equal Protection attack, the validity of Tucson City Ordinances allowing reconsideration and/or rescission of appointment to the office of City Magistrate. Alternatively, Appellant has requested that the Court deem the Jurisdictional Statement a "Petition for Writ of Certiorari" pursuant to 28 U.S.C.§2103 on the basis that a title, right or privilege arising under the Constitution of the United States was specially claimed in the trial court action as is required for certiorari by 28 U.S.C. §1257(3).

Appellate jurisdiction of this Court is proper as to a city ordinance, deemed a state statute, where its validity has been assailed as unconstitutional and which has been held constitutional by a decree of the highest state court in

which a decision could be had. Erznoznik v. City of Jacksonville, 422 U. S. 205 (1975); Terminiello v. City of Chicago, 337 U. S. 1 (1949); Zucht v. King, 260 U. S. 174 (1922). Appellant challenged the application of the ordinances and procedural rules of the Tucson City Council on Separation of Powers, Due Process, and Equal Protection grounds.

Jurisdiction as either appeal or certiorari depends on the characterization of the primary issues in the case. In Lerner v. Casey, 357 U. S. 468, 469 (1958), a similar case dealing with 14th Amendment rights which arose from dismissal of a subway conductor under New York's Security Risk Law, the Court indicated that characterization is the key and is within the Court's inherent power:

> "We consider that the constitutional questions before us relate primarily,

and more substantially, to the propriety of the findings made by appellees rather than to the validity of the provisions of the Security Risk Law. Accordingly, we think it the better course to dismiss the appeal, and to treat the papers as a petition for certiorari, which is hereby granted. 28 U.S.C. §2103."

The United States Supreme Court has jurisdiction of this case regardless of the characterization of the facts and issues.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are set out in the Jurisdictional Statement and in Appellees' Motion to Dismiss or Affirm.

QUESTIONS PRESENTED

The questions Appellant asserts are in issue are fully set forth in Appellant's Jurisdictional Statement. The

questions can be condensed into two basic questions:

Do the ordinances and/or procedural rules purporting to give the Mayor and Council of the City of Tucson power to reconsider or rescind an appointment to the office of City Magistrate after both an affirmative vote of appointment has been taken and notice of appointment to the appointee has been given, violate the Due Process and Equal Protection Clauses of the United States Constitution when considered in light of the necessity for separation of the legislative and judicial branches of government?

Did the acts of the Mayor and Council in repealing, rescinding or reconsidering the appointment without notice, hearing, and opportunity to be heard violate Appellant's Due Process and Equal Protection rights?

STATEMENT OF FACTS

The facts of the case are fully set forth in Appellant's Jurisdictional Statement. Appellees' Statement of Facts omit the important facts of notice of appointment, as required by ordinance, which was given to Appellant prior to any reconsideration by the Council, and, of acts and statements by the Mayor designed to overpower or influence the Council to reconsider, rescind or repeal Appellant's judicial appointment.

ARGUMENT

Reduced to its logical conclusion, Appellees' argument is that the City of Tucson, as a municipality of the state, under home rule, is free to act under its charter without regard to Constitutional requirements of Due Process, Equal Protection and Separation of Powers. Appellant admits that the city is organized under a

charter and that it possesses power to act under the charter and ordinances, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P. 2d 290 (1968), but the powers must be exercised within the bounds of the Constitution. Bishop v. Wood, ____ U. S. ____, 96 S. Ct. 2074 (1976). In United States v. Ballin, 144 U. S. 1, 5, (1891), the Court stated:

> "The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights ...".

The City is required to conduct its business within the confines of the Constitution of the United States and the amendments thereto.

THE CAUSE OF ACTION IS NOT MOOT

The passage of time has not rendered this cause of action moot. The concept of mootness in Supreme Court decisions fails of a concise definition. It is a concept designed to promote the constitutional requirements that a case or controversy exist. In Poe v. Ullman, 367 U. S. 497, 503-504 (1961), the court stated:

"The various doctrines of 'standing', 'ripeness', and 'mootness', which this court has evolved with particular, though not exclusive, reference to such cases are but several manifestations each having its own 'varied application'- of the primary conception that federal judicial power is to be exercised to strike down legislation. . . only at the instance of one who is immediately harm-

ed. . .by the challenged action [cases cited herein omitted]."

The court noted further:

"This principle was given early application and has been recurringly enforced in the court's refusal to entertain cases which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims."

Id at 505.

A case is moot only when there is no longer an existing cause of action between the parties. San Mateo v. Southern Pacific Railway Co., 116 U. S. 138 (1885); Muskrat v. United States, 219 U. S. 346 (1911); Atherton Mills v. Johnston, 259 U. S. 13 (1922). Arizona recognizes the mootness doctrine. In Mueller v. City of Phoenix, 102 Ariz. 575, 583, 435 P. 2d 472

(1967), the court stated "a question is not moot if it seeks to determine an abstract problem which does not arise upon existing facts or rights". The cause of action is not moot under any acceptation of the law.

The action originated as a mandamus action to determine Appellant's entitlement to office and to compel the Clerk of the City of Tucson to swear the Appellant to office. The term of office to which Appellant was appointed expired April 28, 1977; however, the issue of entitlement to office is still alive and is the basis for further litigation between the Appellees and Appellant in Action No. 160834 in the Superior Court of the State of Arizona in and for the County of Pima wherein Appellees are defendants. In that case, Appellant is plaintiff and prays for damages arising from this incident for

breach of employment contract, and for interference with property and liberty interests without Due Process and Equal Protection of law. The Appellant and Appellees have a pecuniary interest in the outcome of this appeal because the Arizona Supreme Court decision will be res judicata to issues in the damages case.

In Giles v. Harris, 189 U. S. 475 (1903), a case requesting a mandatory injunction to place Appellant, a negro, on the voting register, the court stated:

> "This election has gone by so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill of the appeal on that ground, because to be enabled to cast a vote in that election is not, as in Mills v. Green, 159 U. S. 651,

657, 60 L.ed 293, 295, 16 Sup. at Rep. 132, the whole object of the bill. It is not even the principal object of relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903."

The objective of Appellant in bringing the mandamus action was more than just being sworn to office, it was to receive the benefits accruing to one holding such an office. This Court has recognized "that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation on money." Wiley v. Sinkler, 1790 S. 58. The case is not moot.

THE DECISION OF THE ARIZONA SUPREME COURT IS NOT BASED ON A SUFFICIENT AND SUBSTANTIAL INDEPENDENT STATE GROUND

The general principle as to Supreme Court review of State court decisions is found in Stembridge v. State of Georgia, 343 U. S. 541, 547 (19):

"It is a well established principle of this court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision on the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U. S. 14, 18, 57 S. Ct. 350, 352, 81 L.ed. 476; Lynch v. New York,

293 U. S. 52, 55 S. Ct. 16, 79 L.ed 191 and where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it. Klinger v. Missouri, 13 Wall. 257, 263, 20 L.ed 635; Wood Mowing & Reaping Machine Co. v. Skinner, 139 U. S. 293, 297, 11 S. Ct. 622, 624, 49 L.ed 990; Lynch v. New York, supra. ... But it is likewise well settled that if the independent (state) ground was not a substantial or sufficient one, 'it will be presumed that State court based its judgment on the law raising the federal question, and this court will

then take jurisdiction.' Klinger v. Missouri, supra, 13 Wall at p. 263, 20 L.ed 635; Johnson v. Risk, 137 U. S. 300, 307, 11 S. Ct. 111, 113, 34 L.ed. 683; Lawrence v. State Tax Commission, 286 U. S. 276, 282-283, 52 S. Ct. 556, 558, 76 L.ed 1102." (emphasis added).

The Arizona Supreme Court decision does not rest upon a good, valid, sufficient substantial and independent state ground. Johnson v. Risk, 137 U. S. 300 (1890). The Court based its decision on a strained and erroneous interpretation of the Tucson City Charter, Arizona precedent, Supreme Court precedent, and Constitutional law.

In finding that the appointment was not effective or vested immediately, the Court cited no Arizona case law and failed to give credence Tucson City Charter,

Chapter V §4.1, which provides

> "the ... city magistrate ... shall be appointed by the mayor and council and shall hold office for a period of two years from the date of each appointment unless sooner removed. ..". (emphasis added).

Pursuant to the charter, the vacancy in the magistrate's office also caused the appointment to vest immediately. See, Appendix A.

Further, the court refused to acknowledge the fact that notice was sent to Appellant and that the rules of statutory construction require a specific provision to control over a general provision. Kearney v. Mid-Century Co., 22 Ariz. App. 190, 526 P. 2d 169 (1974). The court, in disregarding precedent and constitutional considerations as discussed in the Jurisdictional Statement, pages 18-22, found no vesting of Appellant's interest in office and concluded that he was removable at will. The court further found that no contract of employment existed so that re-

consideration of the appointment was proper. Appellees contend that the decision was correct and cite the Arizona case of Ahearn v. Bailey, 104 Ariz. 250, 451 P.2d 30 (1969) for the proposition that a public office does not create a property or contract right in the holder. Ahearn holds exactly the opposite. Mr. Ahearn was a member of The Industrial Commission whose office was abolished by an act of the State legislature. In Ahearn, the court was careful to distinguish between removal of an incumbent and the abolition of an office. The case deals strictly with, and holds narrowly that, an office holder has no right to compel the continuation of an office. The court stated "It has sometimes been said that the legislature may abolish the office not not the officer." Id at 254. The case in fact supports Appellant's contention that he

had a right to the office and that the Separation of Powers doctrine mandates that the City Council not be able to unseat an incumbent judge at will.

The Arizona Supreme Court further based its decision of the vesting question on the case of City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P. 2d 1011 (1951). The Landrum case dealt with a parking lease entered into by the City of Phoenix and an independent contractor who was to build a 400 car parking garage pursuant to Ordinance No. 5295 which was passed with an emergency clause that failed to fulfill the charter requirements that the existence and reasons of the emergency be stated separately. The court did not discuss the effectiveness of ordinances with or without the emergency clause. The court hold narrowly that "the determination by

the legislature that an emergency exists is an exercise of legislative discretion not reviewable by the judiciary." This case does not deal with appointive judicial offices. Further, the case does not hold, as Appellees would have this Court believe, that the emergency clause provisions apply to legislative appointments of judicial officers to delay effectiveness of appointment for thirty days in their absence. This case also does not involve conduct of the Council taking inconsistent stances as to the same set of facts and circumstances.

The Arizona Supreme Court decision cites Marbury v. Madison, 1 Cranch 137, 2 L.ed 60 (1803) but fails to recognize the import of the case that the office vests upon appointment even where delivery of the appointing papers is not made. If the appointment was not effective immed-

iately, the only thing lacking to make the appointment effective was the passage of time, so that the appointment was vested.

The Arizona Supreme Court decision is not based upon a substantial independent state ground and is untenable under the charter provisions, precedent, and constitutional law. The appeal must be granted because there exists no non-federal basis for the decision.

THE CASE PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW

The Appellant herein has contended at all times that the provisions allowing reconsideration of a motion do not apply to him and that as appointee to the judicial branch of government such reconsideration without notice, opportunity to be heard and cause violated the Separation of Powers doctrine and his Due Process and Equal Protection rights. This chal-

lenge of the constitutionality of an ordinance as construed and applied presents a substantial federal question. Terminiello v. City of Chicago, 337 U. S. 1 (1949). The Appellees allege that such a question is form rather than substance. As in Terminiello, the "pinch" of the ordinance or charter provision is in its application.

A substantial and nonfrivolous federal question exists where an issue is presented which requires analysis and exposition for its decision. Milheim v. Moffat Tunnel Improvement District, 262 U. S. 710, 716-717 (1923). The questions presented here are not "so wanting in substance as not to need further argument." Hodges v. Snyder, 261 U. S. 600 (1923). The fact that the State court decision does not address the federal question involved does not preclude this Court from taking jurisdiction of this appeal. See,

Stembridge v. State of Georgia, supra, and cases citing it.

Generally, a case has no "substantial" federal question if in light of prior decisions no argument is warranted. City of Boston v. Jackson, 260 U. S. 309 (1922). Appellant submits that need for analysis and argument makes this case substantial in light of the cases involving appointment to, and removal from, office including Marbury v. Madison, supra, Humphrey's Executor v. United States, 295 U. S. 602 (1935), Myers v. United States, 272 U. S. 52 (1926), and the recent line of cases involving Due Process right to protection of property and liberty interests, Joint Anti Fascist Committee v. McGrath, 341 U. S. 183 (1951), Wisconsin v. Constantineus, 400 U. S. 33 (1971), Board of Regents v. Roth, 408 U. S. 564 (1972), Arnett v. Kennedy, 416 U. S. 134

(1974) and Bishop v. Wood, supra.

The analysis of this case is as follows:

1) Appellant was appointed for a two-year term of office as magistrate by Resolution No. 9496. Under state law and constitutional considerations of Separation of Powers and Due Process, that office vested immediately in the Appellant. Appellant was not merely "an employee" of the Mayor and City Council, he was a member of the judicial branch and on a co-equal basis with them. See Ahearn v. Bailey, supra, citing Humphrey's Executor v. United States, supra.

2) Appellant was notified of his appointment which created a protectible expectancy, at the very least. See Perry v. Sindermann, 408 U. S. 593 (197), wherein the court stated that a "person's interest in a benefit is a 'property interest for

due process purposes if there are ... rules or mutually explicit understandings that support his entitlement to the benefit'".

3) Appellant's appointment's reconsideration, rescission or repeal was a matter of public record, was at the behest of the Mayor who made comments derrogatory to Appellant's name and reputation as a lawyer and judge, and was done without notice, hearing, or an opportunity to be heard.

This case presents a substantial federal question and fits within the requirements for review and relief set forth in Bishop, v. Wood, supra. The appeal must be granted and probable jurisdiction noted.

CONCLUSION

WHEREFORE, IT IS RESPECTFULLY SUBMITTED that the Appellees' Motion to Dismiss the appeal or Affirm the judgment

must be denied on the grounds that the question is not moot, is not based on a sufficient independent state basis, and presents a substantial federal question.

Respectfully Submitted,

JOHNSON, HAYES & DOWDALL, LTD.

By Richard J. Dowdall
Richard J. Dowdall
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, RICHARD J. DOWDALL, one of the attorneys for JOE JACOBSON, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of August, 1977, I served copies of the foregoing Opposition to Motion to Dismiss or Affirm on the several parties thereto, as follows:

On the Appellees, CITY OF TUCSON, et al, by hand delivering three (3) copies to their attorneys of record:

FREDERICK S. DEAN
Acting City Attorney

THOMAS J. WILSON
Assistant City Attorney
180 North Meyer
Tucson, Arizona 85701

JOHNSON, HAYES & DOWDALL, LTD.

By Richard J. Dowdall
Richard J. Dowdall

APPENDIX A

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Tucson City Charter, Chapter VIII, §6, provides:

> "In the event of a vacancy in office, the appointing power or authority shall immediately, or within such time as expressly provided in this charter, fill the vacancy, which, in the event of offices for a term, shall be for the remainder of the term."

The trial court found that a vacancy existed in the office of city magistrate upon Brashear's resignation. The Arizona Supreme Court cited Sweeny v. State, 23 Ariz. 435, 204 P. 1025 (1922) for the proposition that no vacancy existed by virtue of Brashear's holding over in office. The Arizona Supreme Court failed to give effect to Brashear's letter of resignation. Sweeny actually supports Appellant's position that a vacancy existed and that the appointment vested immediately.

The court stated:

> "Such incumbent [Brashear in our case] is entitled to hold over after the expiration of his regular term, until the happening of both the events mentioned, i.e., the election of his successor and the qualification of such successor. During the period of the tenure as so extended the office will not become vacant, unless for causes which would create a vacancy in the fixed and regular term, such as the death, resignation, removal, disqualification, or the like of the incumbent.

Clearly, the Arizona Supreme Court's reliance on Sweeny to prove no vacancy existed is erroneous.

A vacancy existed under Tucson City Charter, Chapter VIII, §5:

"Sec. 5. When vacancies exist.

"A vacancy shall exist in any elective or appointed office, except under the recall provisions of this charter, when an officer fails to qualify within thirty days after commencement of this term, dies, resigns, removes from the city, absences himself continuously for thirty days from the duties of this office without the consent of the office, for two consecutive months is inconpacitated so that he is unable to attend to the duties of his office, is convicted of violating any of the provisions of this charter, or of a felony, or is judicially declared a lunatic as defined by statute, or, in the office of the councilmen, when a member of the council is selected to fill a vacancy in the office of mayor, as hereinbefore provided." (Emphasis supplied).